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CASE No. 14729.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

HIRAM BARNEY, LATE COLLECTOR OF the port of New York, plaintiff in error,
v.
ALEXANDER RICKARD ET AL., EXECUTORS, etc., of Alexander Rickard, deceased.
} No. 218.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

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This was an action to recover duties paid under protest. The bill of particulars contained items covering the years 1861 to 1864, inclusive. The articles involved on the trial of the case were imported during the years 1863 and 1864 (p. 9). They consisted of textile materials known as veil bareges, plain bareges, crepe maretz, grenadines, and merinos. The case was tried before Judge Lacombe and a jury in 1890, and the jury found a verdict for the importers on all of the articles mentioned except the plain bareges.

There is no exception to the action of the court in sending the case to the jury, which may, therefore, be conceded here to have been the proper course. This concession enables us to avoid examination and comparison of the various statutes then in force relative to rates of duty upon said textile materials.

There are two questions presented by the record: First, do the protests comply with the requirements of the act of February 26, 1845 (afterwards § 3011 of the Revised Statutes)? Second, were certain samples properly admitted in evidence for consideration by the jury?

STATEMENT OF FACTS.

Each of the main questions in the case is raised in a number of different ways. As to each, for greater convenience, we set forth the facts in connection with the assignments of error.

ASSIGNMENTS OF ERROR.

We call the court's particular attention to the following assignments of error:

1. *As to the protests.*—We call attention particularly to the two following instances, which bring the questions out with distinctness:

> It appeared that in case of the importation covered by Exhibit 28, at the time of the entry thereof, February 15, 1864, the plaintiffs' testator deposited with the defendant as collector of customs an amount of money which was equal to an amount of duties thereon at the rate of *about* 40 per centum ad valorem; or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the

entry; that upon such ascertainment or liquidation the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated, and the plaintiffs' testator notified of such liquidation May 26, 1864; that the excess of the amount deposited with the defendant as said collector on February 15, 1864, over and above the amount of duties actually found due on liquidation and retained as above, was refunded to the plaintiffs' testator May 23, 1864; that the plaintiffs' testator obtained possession of each and every part of said importation on or prior to February 26, 1864; and that the protest relating to said importation was dated and endorsed March 4, 1864 (pp. 17, 18).

* * * * *

That in case of the importation covered by Exhibit 38, at the time of the entry thereof, April 20, 1864, the plaintiffs' testator deposited with the defendant, as collector of customs, an amount of money which was equal to an amount of duties thereon, at the rate of *above* 40 per centum ad valorem; or, in other words, an amount in excess of the amount of duties subsequently ascertained on liquidation of the entry; that upon such ascertainment or liquidation, the defendant, as said collector, retained out of said deposit a certain sum as duties, and thereafter returned the excess to plaintiffs' testator; that the entry was so liquidated and the plaintiffs' testator notified of such liquidation May 16, 1864; that the excess of the amount deposited with the defendant, as said collector, on April 20, 1864, over and above the amount of duties actually found due on liquidation and retained as above, was refunded to the plaintiffs' testator May 19, 1864; that the plaintiffs' testator obtained pos-

session of each and every part of said importation on or prior to April 30, 1864; and that the protest relating to said importation was dated May 3, 1864 (p. 19).

In all of the cases but the last, the sum paid the collector is stated to have been "about" not "above," 40 per cent.

Both sides having rested, the defendant's counsel moved the court to direct the jury to find for the defendant as to each of the importations covered by exhibits * * * 28 * * * and 38, on the ground that the payment of the duties sought to be recovered in the case of each of said importations was paid on or about the respective dates of the entry thereof, and the respective protests against the exaction of such duties was not made until after such payments; or, in other words, *was not made at or before such payment*, as required by the aforesaid act of February 26, 1845.

This motion the court denied, and to this ruling the defendants' counsel excepted, which exception was duly noted and allowed.

The defendant's counsel also moved the court to direct the jury to find for the defendant as to each of the importations covered by Exhibits * * * 28 * * * and 38, on the ground that if the date of the payment of the duties exacted thereon was not the date of the liquidation of such duties, and the notification to the plaintiff's testator of such liquidation, the plaintiff's testator obtained possession of the goods embraced within such importations before such payment; or, in other words, *did not pay the duties thereon to obtain such possession* as required by said act of 1845.

This motion the court denied, and to this ruling the defendant's counsel excepted, which exception was duly noted and allowed (pp. 19–20).

2. *As to the samples.*—Among the goods imported were certain *plain bareges* and *grenadines*, each composed of a silk warp and worsted weft (p. 10). No samples of these imports, or of any similar goods imported by Rickard, were put in evidence (p. 15). The only samples introduced, from which the jury were to guess what Rickard's imports under these names were like, were as follows:

Gardiner S. Hawes, a merchant belonging to another firm, was shown a certain sample which, as he testified, "was known in this country in 1861 as *a grenadine or a barege.*" This was objected to, among other grounds, as "in no way connected with any goods in suit," but admitted as Exhibit 44, and defendant duly excepted (p. 12).

The next sample, as he testified, "was *a barege*, and *might be called a grenadine sometimes.*" This was likewise admitted under exception, and also marked Exhibit 44 (p. 13).

The next sample "was *a grenadine*, what they called *an iron barege*, or an iron frame barege; * * * that the *real name* for it was, in French, *canevas*, because they resembled canvas; that when they came here they got the name of iron bareges; that it was not a species of grenadine; it was a grenadine, only it had a disposition of threads more or less heavy and harsh." This was likewise admitted under exception as Exhibit 45 (p. 13).

Whatever error may have occurred here was not thereafter cured.

The same witness further testified that "Exhibit 44 did not differ at all from a plain barege, a silk and worsted

barege as known in trade and commerce in 1861, '2, '3, and '4; it was simply a barege; that Exhibit 45 was a grenadine and in 1862, '3, and '4 was known in trade and commerce in this country as *an iron barege;* * * * that itdidnot differ in any respect from what was known to trade and commerce in this country in 1862, '3, and '4 as grenadine (p. 13);" * * * "that he did not know anything about the bareges in this suit; * * * that there was a great variety of grenadines; * * * that if a grenadine were of a quality worth 65 cents, it would not represent at all one which was worth $1.25, (p. 14)."

The jury found for the defendant as to the plain bareges, and for the plaintiffs as to the grenadines (p. 20); that is, we may assume, as to those imports which they supposed to correspond with the grenadines or *quasi*-grenadines known as iron bareges.

The admission of these samples is assigned for error; and most particularly the admission of the iron bareges. The court explained it in his charge as follows (p. 20):

> Much has been said on both sides in regard to the samples of plaintiff's goods. There are none produced here. I should have thought it rather extraordinary if, after the lapse of twenty-seven years, either side had preserved scraps of the particular bales of goods which came in by these vessels. There is no inference to be drawn for or against anybody from the mere fact that, after this great lapse of time, scraps of the identical goods that came in by these thirty-nine vessels are not produced before you and separately identified. That fact makes nothing one way or the other. Under the circumstances the plaintiff has done the best he can; he has produced here certain samples which men in the trade state are

samples which fairly represent goods that bore the same names, and of the same kinds of goods that he introduced, or that were named in his invoices; although, as to all these samples (I think it is as to all of them), the witnesses agree that there were variations in quality and in grade, perhaps in the number of threads to the square inch, in the particular fineness or superiority of the materials used, and, of course, in color. With those variations (which, of course, you all recognize are common and familiar variations in different articles of trade), these samples are submitted to you on behalf of the plaintiff as being the best he can do toward giving you fair samples of the goods which he imported. These, then, are to be compared with samples of the standard, in order to determine whether they are goods of a similar description to that standard.

ARGUMENT.

I.

As to protest.—In the case of Exhibit 38, Rickard paid the collector April 20, 1864 (the payment being called in the record a "deposit"). He received his goods April 30. He did not protest till May 3. The entry was liquidated May 16. The collector admitting that he received an overpayment, the difference between the amount of duties was finally decided upon by the collector and the amount as paid by Rickard was refunded May 19.

It is evident that if the actual transfer of the money on April 20 constituted its payment, that payment was not made under protest. On the other hand, it is evident that if the actual payment is not to be considered as having been made at the time the money was actually handed over, but at the time when the entry was liquidated or

when the excess over the liquidated amount of duties was repaid by the collector, then the payment was not made under duress; for Rickard already had got his goods.

As is well known, these actions of *assumpsit* against collectors for money had and received depended at first purely upon common law principles. The moneys were regarded by the courts as paid under duress of goods, and the protest both evidenced the fact that the payment was involuntary and warned the collector not to pay the money into the Treasury. (*Elliott* v. *Swartwout*, 10 Pet., 137.) In January, 1845, the Supreme Court, two justices dissenting, decided that a certain act of 1839 (now Revised Statutes, § 3010) had cut off this common law right of action. (*Cary* v. *Curtis*, 3 How., 236.) This ruling gave rise to the act of February 26, 1845, ch. 22 (5 Stat., 727; Rev. St., § 3011), entitled "An act explanatory of an act entitled 'An act making appropriations for the civil and diplomatic expenses of Government for the year 1839.'"

This act of 1845 provided as follows:

> That nothing contained in [said section] shall take away, or be construed to take away or impair, the right of any person or persons who have paid or shall hereafter *pay* money, as and for duties *under protest*, to any collector of the customs or other person acting as such, *in order to obtain goods, wares, or merchandise, imported by him or them, or on his or their account*, which duties are not authorized or payable in part or in whole by law, to maintain any action at law against such collector or other person acting as such, to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury, touching the same,

according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, *at or before the payment of said duties*, setting forth distinctly and specifically the grounds of objection to the payment thereof.

This statute was the only one in existence regulating payments under protest upon importations of dutiable goods until the enactment of the statute of June 30, 1864, after the importations here in suit. There was a statute in 1857, which, however, is immaterial to the present questions, as it applied only to goods entitled to free entry.

This action is almost on all fours with that of *Barney* v. *Watson* (92 U. S., 449), which related to another entry of goods, the duties upon which were paid to the same collector; and the entry under consideration in that case was contemporaneous with those in the case now at bar.

The only distinction between the former case and the case at bar is that in the former case the collector estimated the duties at the time of entry in the ordinary manner, ascertaining the precise amount in dollars and cents by applying the law as understood by him to the facts as stated in the importer's invoice, while in the present case the same collector, being in doubt as to the amount of duties payable, may, instead, have exacted an amount sufficient in his opinion to include whatever might turn out to be the correct sum. It thus happened that in the

former case the collector, at the time of liquidation, increased the amount of duties as originally ascertained, while in the case at bar he reduced them and repaid the difference to the importer.

In *Barney* v. *Watson* the goods were entered December 24, 1863. On the same day the sum of $8,840.93 was "paid on account" by the importer, as stated by Mr. Justice Bradley at page 450. By reference to the original record on file in this court, at pages 14 to 15, it will be seen that this $8,840.93 was not a payment "on account" in the sense of being a part payment upon some larger amount ascertained or unascertained. It appears plainly, on the other hand, that the collector took the invoice, calculated the number of pounds of the article therein contained for the purpose of specific duties, and calculated the total valuations, as shown by the invoice, for the purpose of the *ad valorem* duties, and that he then, multiplying the amounts thus obtained by the statutory duty as understood by him, carried out the figures in dollars and cents, which figures added up the precise sum of $8,840.93.

On liquidation of the entry, however, the collector found corrections to make in these figures. In other words, he found that the importer's valuations were too low, or that his representations as to the character of the goods were erroneous, or that his own views of the law were in need of correction. On liquidation, therefore, the collector fixed the value of the goods at $10,023.64, leaving a balance due from the importer of $1,182.71. (Record, pp. 14, 15.) It appears, by the record, that the collector's original memoranda of December 24, 1863,

were made upon the original entry in blue ink, while his final memoranda at the time of the liquidation were made also upon the original entry, but in red ink. The liquidation of the entry was made March 11, 1864. The additional duty of $1,182.71 was paid and the protest made March 24, 1864. No protest was made at the time of the payment of the $8,840.93. This was probably because the importer, relying on certain *dicta* in *Marriott* v. *Brune*, hereinafter considered, thought that the transfer of money in December was a "deposit" and not a true payment within the meaning of the act of 1845.

The question between the importers and the collector related to the proper rate of duty upon certain flannels. These the importer classified at 35% *ad valorem*, while the collector classified them at 35% ad valorem *plus* a specific duty of 18 cents per pound. Mr. Justice Bradley states that there were 7,984 pounds of these goods, so that the duty at the rate of 18 cents per pound was $1,437.12. This difference was partly represented by the payment under protest of $1,182.71. There was, however, a balance of about $250 represented by part of the $8,840.93 paid at the time of the importation of the goods.

The court held unanimously that as to this sum illegally exacted in December, the plaintiff must fail to recover because he had then failed to protest. Mr. Justice Bradley said:

> The principal question below, and that which has been most discussed in this court, is whether the plaintiffs gave timely and sufficient notice of protest and dissatisfaction with the decision of the collector.

haps, not impossible that in the case at bar the collector did precisely this thing. He is stated in the record to have demanded "about 40%" or "above 40%." It may be that the collector thought these textile fabrics in suit to be possibly dutiable at 40% *ad valorem*, and therefore exacted that amount instead of the lower figures, which he finally held to be correct.

There is no statutory provision for a "deposit." Either the exact amount of estimated duty must be paid in cash, or a warehousing bond must be given; otherwise the goods can not be "entered," but are put in public store by the collector as unclaimed.

The original statute, regulating the collector's actions at the time of the entry was the act of March 2, 1799, ch. 22, § 49 (1 Stat., 664; see Rev. St., § 2869).

> And the collector jointly with the naval officer, or alone where there is none, shall, according to the best of his or their judgment or information, make *a gross estimate of the amount of the duties on the goods*, wares, or merchandise to which the entry of any owner or consignee, his or her factor or agent, shall relate, which estimate shall be indorsed upon such entry and signed by the officer or officers making the same. And *the amount of the said estimated duties, having been first paid or secured to be paid* pursuant to the provisions of this act, the said collector shall, together with the naval officer, where there is one, or alone where there is none, grant a permit to land the goods, wares, and merchandise, whereof entry shall have been so made, and then and not before it shall be lawful to land the said goods.

By the act of May 28, 1830, ch. 147, § 4 (see Rev. St., § 2899), if the importer desired immediate posses-

sion of his goods he was required to give what is called a "ten-day bond." This is in addition to paying or securing the duties. By the act of August 30, 1842, ch. 270, § 12, *all duties were required to be paid in cash*, in part abrogating the statute of 1799. By the warehouse acts, beginning with that of August 6, 1846, ch. 84, § 1, the right to secure the duties was restored in case of entries for warehousing; the security was by bond, not for an amount in gross to be fixed by the collector, but for double the amount of duties as estimated.

An invoice is necessary upon every entry. (Act of March 3, 1862, ch. 76, § 1; see Rev. St., § 2860.) The original invoices must be produced to the collector and naval officer, and the entries must be verified by oath. (Act of March 2, 1799, ch. 22, § 36; 1 Stat., 655–7; see Rev. St., §§ 2785–6.) The collector is required by the statute (either alone or with the naval officer) to estimate the duties and indorse the amount upon the entries in the manner shown by the record in the Watson case. (Act of 1799, § 21; 1 Stat., 642; see Rev. St., § 2621.) The weighers, gaugers, and measurers do their work after the vessel is discharged and therefore after the duties have been paid or secured to be paid. (Act of 1799, § 72; 1 Stat., 678; see Rev. St., § 2890.) The appraisement to ascertain the true valuation of the articles is also a subsequent proceeding. (Act of August 30, 1842, ch. 270, § 21; 5 Stat., 565; see Rev. St., § 2901.)

In *Marriott* v. *Brune*, above referred to, this court regarded all payments to the collector at the time of original entry as being in the nature of security. That ruling,

as will be shown in the Appendix hereto, was not necessary to the decision of the case, and the decision in *Barney* v. *Watson*, above described, overrules it.

It therefore follows that when the duties are estimated in the customary way, as above set forth, and the importer chooses to pay these duties in cash instead of entering them for warehousing, he must protest at or before the time of payment, in order to preserve a right to sue the collector subsequently in an action of *assumpsit*.

It remains to discuss whether any difference is made by the fact that the collector, instead of making "a gross estimate of the amount of the duties," "according to the best of his * * * judgment or information," as required by the statute and ordinarily done, takes the arbitrary course of imposing instead a larger sum to insure against any mistakes or miscalculations, like a court taking security for costs.

We shall assume this to have been done in the case of the entry upon which the collector exacted "above 40%."

As to the entries upon which he exacted "about 40%," it is submitted that the presumption in favor of the collector applies (*Erhardt* v. *Schroeder*, 155 U. S., 124); that he is to be regarded as having done his duty properly, and he is therefore to be regarded as having made a gross estimate of the duties payable upon some theory of the law not explained or necessary to be explained in the record, but which, if correct, made the goods dutiable at 40% *ad valorem*. In other words, we submit that the word "about" should be regarded, not as indicating that the collector deviated from his statutory duties, but as indi-

cating rather that he might have made some small miscalculation which would come within the maxim *de minimis non curat lex*.

If this be a correct position, there must be a reversal of the judgment without considering the entry in which he is stated to have charged "above" 40%.

The testimony of Amos A. Smith, a custom-house broker (pp. 10,11), would indicate a custom among the collectors in cases of doubt of exacting a sum sufficient to "more than cover" the duties. If this means anything more than the present and proper custom of exacting the higher of two possible rates of duty—if it indicates a custom to protect the Government in such doubtful cases by naming a mere arbitrary figure, like a judge fixing security for costs—then it was an illegal act, but the question still remains whether the present case is distinguishable from *Barney* v. *Watson* on that ground.

We respectfully submit that it is not; that the importer may have had a right to complain, but that his complaint should have been made in the form of a protest, as required by the act of 1845, as construed in cases above cited.

However this may be, the protest, if made before payment, was not made to obtain possession of the goods. The so-called "deposit" was made April 20, and the liquidation was May 16. If the former was the payment, it was without protest. If the latter was the payment, it was without duress (*Crocker* v. *Redfield*, 4 Blatchf., 378).

Much discussion has arisen from subsequent developments of the law regarding protests, made by statutes of 1864, 1874, and 1877. By the Revised Statutes of 1874, this common law action of *assumpsit* was turned into a purely statutory action. Cases are pending in the lower courts arising since the adoption of the Revised Statutes and involving questions not involved in the case at bar, and upon which the case at bar can have no bearing except so far as it may define the character of the cash payment of estimated duties. In the confused state of the authorities upon this subject, it is important to keep the history of the statutes in this regard clearly in mind. Embarrassing *dicta*, subsequently overruled, yet even thereafter frequently quoted, are to be found not only in the Marriott and other cases, not already considered, but even, as will be shown, in *Barney* v. *Watson* itself. We shall therefore set out in the Appendix the history of this litigation and of the statutes concerning it down to the revision of the statutes in 1874. Subsequent changes we shall refrain from discussing, as they are the subject of litigation the parties to which are not here represented.

II.

As to the samples.—It is submitted that these samples are incompetent as evidence of what Rickard imported, and are irrelevant in themselves.

As a general rule, "a fact which renders the existence or nonexistence of any fact in issue probable by reason of its general resemblance thereto * * * is deemed not to be relevant to such fact." (Stephen on Evidence, art.

10.) This case does not come within any of the recognized exceptions to the rule, all of which are clearly set forth by Mr. Justice Stephen.

"Grenadine" was an ambiguous term. Two or three varieties were put in evidence. As to all but one the jury found for defendant. There is scarcely foundation even for a guess that the articles imported by Rickard under the name of grenadines were iron bareges, or claimed by him to be such; yet, to make the proof relevant it must be presumed, as against the collector's action, that Rickard claimed his goods to be iron bareges, and that his claim was a correct one.

Nor is there any presumption of loss or destruction such as would let in secondary evidence of Rickard's samples. Protest was made very shortly after the entry of the goods. This foreshadowed an action which was actually commenced in 1866 by the same attorney who tried the case in 1890 (pp. 2, 8). The presumption would be that all necessary samples (the goods not being perishable in nature) would be carefully preserved. Nor is this evidence proper as secondary evidence. The samples introduced are not connected with the importations in question, by testimony of persons who had dealt in Rickard's goods, or otherwise.

Whatever may be the rule as to an appeal, it must be presumed upon a bill of exceptions that all material testimony bearing upon each exception is incorporated in the record. (See *Halpin* v. *Phenix Ins. Co.*, 118 N. Y., 165; *Brayton* v. *Sherman*, 119 N. Y., 623; cases decided

under the New York procedure, but depending, in this respect, upon general principles equally applicable in the Federal courts.)

It is respectfully submitted that the judgment should be reversed.

EDWARD B. WHITNEY,
Assistant Attorney General.

APPENDIX.

HISTORY OF SUITS AGAINST COLLECTORS PRIOR TO THE REVISION OF THE STATUTES IN 1874.

The right to sue collectors depended originally on the common law alone. The actions were actions of *assumpsit* for money had and received. The money was regarded as paid under duress in order to obtain possession of merchandise detained by the collector, and the payment was made under protest, the protest being both to evidence the fact that the payment was involuntary and to warn the collector not to pay the moneys over into the Treasury.

These actions were originally brought in the State courts, and could reach the Federal judiciary only by a writ of error from the highest court of the State. (*Insurance Company* v. *Ritchie*, 5 Wall., 541, 543.)

Such actions in State courts became numerous, and the nullification movement in 1833 making it desirable to draw all litigation regarding revenue into the Federal courts, the revenue collection act of March 2, 1833, ch. 57, § 3, authorized the removal by defendant into the Federal court of any suit "commenced in a court of any State against any officer of the United States or other person for or on account of any act done under the revenue laws of the United States, or under color thereof."

Among the actions so removed was *Elliott* v. *Swartwout* (10 Pet., 137). This was the prototype in the Federal courts of the familiar actions against collectors of customs. The judges of the circuit court certified to the Supreme

Court the question whether a collector, acting in good faith and under instructions from the Treasury Department, was personally liable in an action to recover back an excess of duty paid to him as such, and by him in the regular or ordinary course of his duty paid into the Treasury of the United States. This court, speaking by Mr. Justice Thompson, answered that if no protest was made or notice given at the time of the payment the collector was not liable, but if notice was given by the importer that the duties were too high and that he would sue to recover back the excess, then the collector was liable.

The practice during these times was for the collector, when notified of the importer's intention to sue, to deposit the moneys in bank in his own name to await the result of the suit, and this practice drew support from the arguments of the court in *Elliott* v. *Swartwout*, *supra*. The same practice was also followed by the collector with relation to moneys paid without protest for the "unascertained" or "estimated" duties until liquidation. These were also held by him in his individual name pending the final ascertainment and liquidation of the duties. Very large sums of money came thus to be left in the hands of Samuel Swartwout, collector of the port of New York from 1829 to 1838, and this partly led to his famous defalcation, which was discovered during the latter year.

Steps were immediately taken by Levi Woodbury, then Secretary of the Treasury, to prevent such practice for the future, and he first applied to Attorney-General Grundy for an official opinion upon the propriety of the practice. Mr. Grundy gave an opinion that the collectors must pay the duties collected by them into the Treasury, although paid under protest and the subject of pending suits. (3 Op., 392.) To avoid all question, however, a section was inserted in the civil and diplomatic appropriation act of March 3, 1839, ch. 82, § 2, as follows:

> *And be it further enacted*, That from and after the passage of this act all money paid to any collector of

> the customs, or to any person acting as such, for unascertained duties or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the Treasurer of the United States, kept and disposed of as all other money paid for duties is required by law or by regulation of the Treasury Department to be placed to the credit of said Treasurer, kept, and disposed of, and shall not be held by the said collector, or person acting as such, to await any ascertainment of duties or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectible in any case where money is so paid; but whenever it shall be shown to the satisfaction of the Secretary of the Treasury that in any case of unascertained duties or duties paid under protest more money has been paid to the collector, or person acting as such, than the law requires should have been paid, it shall be his duty to draw his warrant upon the Treasurer in favor of the person or persons entitled to the overpayment, directing the said Treasurer to refund the same out of any money in the Treasury not otherwise appropriated.

The first portion of this section is now substantially incorporated in § 3010 of the Revised Statutes.

In January, 1845, in *Cary* v. *Curtis*, 3 How., 236, the Supreme Court, Justices Story and McLean dissenting, seem to have surprised the community by handing down a decision that this provision of the act of 1839 cut off the importer's action of *assumpsit*. The argument of the majority of the court was that, as the collector was thereby required to pay moneys collected into the Treasury without regard to protests filed, and without awaiting the result of suits brought, he was converted into a mere messenger not in privity with the importer; and that the importer's sole remedy was by an application to the Secretary of the Treasury under the same section.

A bill was immediately introduced into the Senate to restore the right of action, and Mr. Woodbury, then a member of the Senate, stated that there had been no intention in drafting the statute of 1839 to take the right away. This bill became the act of February 26, 1845, ch. 22, hereinabove quoted, which act, it will have been perceived, is not enabling, but restorative or substantially declaratory in character. It provided that nothing in the act of 1839 should be construed to take away or impair the common law right of action to recover duties paid to get possession of imported merchandise, but provided that the action should not be maintained unless the protest "was made in writing and signed by the claimant *at or before* the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."

The operation of this new act was thus to cure an unforeseen defect in the language of the act of 1839, and continue an ancient right of action; while at the same time it contained the restrictive provision that the protest should be in writing, and should particularize the grounds of objection. The common law as administered prior to 1839 was satisfied with an oral protest. (*Swartwout* v. *Gihon*, 3 How., 110.)

The provision that the protest must be at or before the time of payment was declaratory of the common law, and that the payment must be made in order to obtain possession of the goods was recognized by the statute to be a common law requirement. (See *Elliott* v. *Swartwout*, *supra*; *Cary* v. *Curtis*, *supra*, at pp. 239–40; *Maxwell* v. *Griswold*, 10 How., 242, 246; *Erskine* v. *Van Arsdale*, 15 Wall., 75; *Railroad Co.* v. *Commissioners*, 98 U. S., 541, 545; *Wright* v. *Blakeslee*, 101 U. S., 174, 179.)

The statute of 1845 came up for interpretation first in 1849, in the case of *Beune* v. *Marriott*, Taney, 132. This

case related to importations of sugar at the port of Baltimore in 1847, and involved more than one question. Plaintiffs paid the "estimated duties" in cash to obtain possession of their goods. The goods were thereupon landed and examined by the weighers and gaugers. This examination showed that the goods had suffered from leakage during the voyage; and the suit was "brought to recover back so much of the money as was paid for duties upon that portion of the cargoes which was lost on the voyage by leakage" (p. 138). Plaintiffs did not protest until April 9, 1847, which was after the occurrences above mentioned, but prior to the final liquidation of the duties. Mr. Chief Justice Taney gave judgment for the plaintiffs, making the following remarks (pp. 144–5):

> The protest is not required to be made on or before the payment of what are called the estimated duties, for this payment is necessarily regulated by the invoice quantity as well as the invoice price. *The importer can not at that time know whether there has been any loss by leakage*, nor can he know, after it has been ascertained by the weigher and gauger, whether the collector will exact duties upon the amount stated in the invoice. The protest is legally made when the duties are finally determined and the amount assessed by the collector, and a protest before or at that time is sufficient notice, as it warns the collector, before he renders his account to the Treasury Department, that he will be held personally responsible. * * * The payment of the money upon the estimated duties is rather in the nature of a pledge or deposit than a payment, for it remains in the hands of the proper officer, subject to the final assessment of the duties, and if more has been paid than is due, which is most commonly the case, the surplus belongs to the importer, and is returned to him. Upon the whole, the court is of opinion * * * that the protest of 9

April, 1847, covers all the cargoes where duties had not before been finally assessed and adjusted by the collector.

This language of the learned Chief Justice seems opposed to the subsequent decision of the Supreme Court in *Barney* v. *Watson*, above quoted. The payment of estimated duties was precisely alike in the two cases. It is to be noticed, on the other hand, that these remarks were unnecessary to the decision of the case. It was absolutely impossible for the importers to know when they paid their duties that they were paying for more sugar and molasses than they actually were importing. The leakage was ascertained by the weighers and gaugers after the goods were put ashore. The goods could not be put ashore until the duties had been paid, unless the goods were to be left in warehouse under the act of August 6, 1846. The payment of the moneys in question was necessarily made while the goods were still aboard ship.

The moneys were therefore paid by the plaintiffs, *not under a mistake of law by the collector, but under a mutual mistake of fact.* They and the collector both supposed that a certain number of pounds of sugar and molasses were to be unladed. The money was paid accordingly and both parties satisfied. There could not be a protest, because there was nothing to protest about. Protests under the act of 1845, as at common law, apply only to cases of duress, where one party is forcing the other. There is no requirement of protest, and there can not, in fact, be a protest where both parties are satisfied, because both are acting under the same mistake of fact. (*Hunt* v. *Schell*, cited by Mr. Justice Nelson at 5 Blatch., 278.)

If, therefore, the tariff laws then in operation required that the duties should be paid only on "merchandise actually imported or brought in," instead of upon all merchandise shipped and named in the invoice, it would follow that refunds were required by law to be made in cases

of leakage after the payment of the duty under protest; in other words, that correlative to the right of recovering duties paid under protest was the right in some cases to demand and sue for moneys already paid. This was perceived by Chief Justice Taney, who called attention to the applicability of the last proviso to § 21 of the tariff act of August 30, 1842, ch. 270:

> *Provided further*, That if on the opening of any of the package or packages of goods a deficiency of any article shall be found on examination by the appraisers, the same shall be certified to the collector on the invoice, *and an allowance for the same be made in estimating the duties.* (Now Rev. St., § 2921.)

This section applied only to goods appraised—that is, to goods subject to *ad valorem* duties; but this importation was made under the tariff of 1846, which was entirely *ad valorem*.

The learned justice seems also to have overlooked the bearing on that case (as on all subsequent cases) of the acts of August 30, 1842, ch. 270, § 6, and August 6, 1846, chap. 84, § 1. The act of 1799, as shown in the body of the brief, provided that on entry and before unlading the duties should be "paid or secured to be paid." The act of 1842, however, in part abrogated this provision by requiring that "the duties on all imported goods, wares, or merchandise shall be paid in cash," or otherwise the goods should be stored and sold. From the date of this act for nearly four years the importer had no escape from making actual payment before unlading; and the provision of the act of 1845, with relation to paying under protest, must have had reference to the payment contemplated by this then recent act of 1842 (which was an act establishing largely a new system both as to rates of duty and as to administrative provisions).

The act of August 6, 1846, however, entitled "An act to establish a warehousing system," etc., amended the sec-

tion above referred to; and, while preserving the provision that the duties shall be paid in cash, and that goods upon which the duties were not paid should be deposited in public store and sold by the collector, established also the system of "entries for warehousing," by which the duties, instead of being paid, could be secured by a bond with sureties in double their amount in such form as the Secretary of the Treasury should prescribe. Since August 6, 1846, and up to the present time (Rev. St., §§ 3009, 2964), there is a *payment* in cash of the duties in case of entries for consumption, and a security by bond in the case of entries for warehousing.

That the moneys handed over by the importer to the collector upon the entry of the goods constituted a *payment*, and not a *deposit for security*, was recognized by Chief Justice Taney himself in his opinion in *Tremlett* v. *Adams* (13 How., 295, 303–4), in which he discusses the warehousing act of 1846:

> Previous to the passage of this act no goods chargeable with cash duties could be landed at the port of delivery until the duties were *paid* at the port of entry. * * * The permit could not be granted unless the duties had been paid. * * * The importer himself had no right to land them, even at the port of entry, before the duties were *paid*. But where the entry at the custom-house was imperfect for want of the proper documents, or where the goods were damaged in the voyage and the duties could not be immediately ascertained, or the cash duties were not paid after the form of entry had been complied with, in all of these cases the collector was directed by existing laws to take possession of such goods and place them in the public stores and retain them until the duties were paid. (See also *Saltonstall* v. *Russell*, 152 U. S., 628, 631.)

The Marriott case was taken to the Supreme Court, and is reported there under the title of *Marriott* v. *Brune* (9 How., 619). A long opinion was handed down by Mr. Justice Woodbury. The portion relating to the timeliness of the protest as to goods already entered is very short, however, and is as follows (p. 636):

> There is no pretense that the protest by letter, dated the 9th of April, 1847, was not good in form and substance for all the cargoes which had then been entered and the duties not paid. Though in some of the previous entries no protest had been made at the time, under an impression that the duties on what had been lost would voluntarily be refunded, yet where the payment had been closed up, the court did not feel justified, nor do we, in embracing those cases under any existing equities without the written protest required by the act of Congress. (5 Stats. at Large, 727.) But where the duties had not been closed up in any cases when the written protest in April was filed—though the preliminary payment of the estimated duties had taken place—the court justly considered the protest valid; because till the final adjustment the money *remains in the hands of the collector*, and is not accounted for with the Government, and more may be necessary to be paid by the importer.

If the foregoing comments on Chief Justice Taney's opinion are correct, this language is opposed to the statute and to subsequent authorities, and must be regarded as overruled, although the case itself was correctly decided. This case of *Marriott* v. *Brune* has been singularly subjected to criticism. The italicized words seem to show that the act of 1839, as well as the act of 1842, was overlooked. Not only was the language just quoted disregarded, as we shall show, by Mr. Justice Nelson, who himself concurred in the decision of the case, but the

same justice also, in *Napier* v. *Barney*, 5 Blatch., 191, overruled in effect its definition of "draft" (see brief for plaintiff in error in *Seeberger* v. *Wright & Lawther Co.*, No. 219 of this term); and the ruling of the court as to prospective protests was also subjected to severe criticism in subsequent cases (*Schell's Executors* v. *Fauché*, 138 U. S., 562, 570–2), while it was reversed by Congress in the act of June 30, 1864, below cited.

In *Crocker* v. *Redfield*, 4 Blatch., 378, in 1859, the question of the "estimated duties" came squarely before Mr. Justice Nelson for decision. That learned justice, as above remarked, had concurred in the opinion of the Supreme Court in *Marriott* v. *Brune*. His opinion on this point is as follows (p. 380):

> As it respects the excess of duty claimed to be recovered upon the shipment of jute, it is a sufficient answer to say that the protest is defective. It appears on the face of it that the money was paid and in the hands of the collector before the protest was made against the payment of the duty and the penalty. There is no date to it, but the inference is unavoidable from the facts stated in it. Indeed, a balance is still in the hands of the collector of $92.85. *It is said that the money was only deposited with the collector as security for the payment of the duties when ascertained, and that the application did not take place till the ascertainment of the duties. Admitting this to be so, I do not agree to the consequence claimed.* The money deposited was to be applied by the collector to the duties, and *it can not be said after this that it was paid compulsorily in order to get possession of the goods.* The protest, after the duties were ascertained, came too late.

Mr. Justice Nelson thus presented the same dilemma which is presented by the exceptions in this record.

Either the protest was too late, or the payment was not made to get possession of the goods.

A few years later, in *Moke* v. *Barney*, 5 Blatch., 274, Mr. Justice Nelson used language inconsistent with his own decision in the Crocker case, and similar to that of Chief Justice Taney and Mr. Justice Woodbury in the Marriott case. The language was unnecessary to the decision, for he gave judgment in favor of the collector. There seems to have been no protest in the case at all (p. 278).

Finally, as fully shown in the body of this brief, the question came before the Supreme Court in *Barney* v. *Watson*, 92 U. S., 449, and was squarely decided. Though none of the former decisions are discussed, the decision follows the plain meaning of the statute of 1845 as illustrated by the statutes of 1799, 1842, and 1846, supporting the Crocker case and overruling the *obiter dicta* of the Marriott and Moke cases.

Barney v. *Watson* is the last of the decided cases, the controversy in which arose before the passage of the act of 1864 hereinafter mentioned—that is, the last until the case at bar. Some remarks of the court, indeed, in *Davies* v. *Miller*, 137 U. S., 284, 287, 289, quoting the Marriott case and an unreported decision of Judge Shipman, of Connecticut, at circuit, appear inconsistent with *Barney* v. *Watson*. The present point, however, was not before the court, so that these remarks are entirely *obiter*. In the *Davies* case the court below had ruled out the protest, not because it was too late, but because it was too early. (See remarks of Judge Colt in *Birtwell* v. *Saltonstall*, 63 Fed. Rep., 1004, 1008.) The court held that under the act of 1864 protest could not be made before final liquidation. The Supreme Court, reversing the decision, said that it could be made at any time after entry. Whether it could be made after payment was not a question presented for consideration.

This brings us to the act of June 30, 1864, ch. 171, § 14 (now Rev. St., § 2931), which was as follows:

> *And be it further enacted*, That on the entry of any vessel, or of any goods, wares, or merchandise, the decision of the collector of customs at the port of importation and entry, as to the rate and amount of duties to be paid on the tonnage of such vessel or on such goods, wares, or merchandise, and the dutiable costs and charges thereon, shall be final and conclusive against all persons interested therein, unless the owner, master, commander, or consignee of such vessel, in the case of duties levied on tonnage, or the owner, importer, consignee, or agent of the merchandise, in the case of duties levied on goods, wares, or merchandise, or the costs and charges thereon, shall, within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, as well in cases of merchandise entered in bond as for consumption, give notice in writing to the collector on each entry, if dissatisfied with his decision, setting forth therein distinctly and specifically the grounds of his objection thereto, and shall, within thirty days after the date of such ascertainment and liquidation, appeal therefrom to the Secretary of the Treasury, whose decision on such appeal shall be final and conclusive; and such vessel, goods, wares, or merchandise, or costs and charges, shall be liable to duty accordingly, any act of Congress to the contrary notwithstanding, unless suit shall be brought within ninety days after the decision of the Secretary of the Treasury on such appeal for any duties which shall have been paid before the date of such decision on such vessel, or on such goods, wares, or merchandise, or costs or charges, or within ninety days after the payment of duties paid after the decision of the Secretary. And no suit shall be maintained in any

> court for the recovery of any duties alleged to have been erroneously or illegally exacted until the decision of the Secretary of the Treasury shall have been first had on such appeal, unless said decision of the Secretary shall be delayed more than ninety days from the date of such appeal in case of an entry at any port east of the Rocky Mountains, or more than five months in case of an entry west of those mountains.

This section introduced the system of appeals to the Secretary of the Treasury prior to bringing suit. It established a rule of *res adjudicata*, applicable alike to importers' suits and to Government suits against the importer or his bondsmen or the imported goods. The rule thus established, applicable to all these cases, was that the collector's decision as to the rate and amount of duties should be final and conclusive against all persons interested, unless the party aggrieved should "within ten days after the ascertainment and liquidation of the duties by the proper officers of the customs, *as well in cases of merchandise entered in bond as for consumption*, give notice in writing to the collector, *on each entry*, if dissatisfied with his decision, setting forth therein, distinctly and specifically, the grounds of his objection thereto." This not only secured promptness of objection in case of goods entered for warehousing (where previously the objections could be reserved for three years), but it also required a new notice upon each entry, thus doing away with the embarrassments caused by the former loose system of prospective protests. (*Schell's Executors* v. *Fauché*, 138 U. S., 562, 570, and cases cited.)

The "notice" in writing, provided for in this section, was not a common-law protest, and had no relation to the old common-law suit which had been resuscitated by the act of 1845. This "notice" was the institution of a very different proceeding, namely, a proceeding entirely conducted within the executive department of the Govern-

ment. This new "notice" had a very different scope from the "protest" of 1845; for in the case of warehoused goods it may have to be made long before the payment of the duties or the delivery of the merchandise. (*Westray* v. *United States*, 18 Wall., 322.)

Nevertheless, the Treasury Department and the lower courts ruled that this act of 1864 repealed the act of 1845, and that the "notice" therein mentioned was a substitute for the ancient protest. The Treasury, therefore, for a considerable time refused to receive any protests or notices before the liquidation of the entry, and it was this action which gave rise to the case of *Davies* v. *Miller*, above cited.

This theory of the repeal of the act of 1845 was sustained by *dicta* of Mr. Justice Bradley in *Barney* v. *Watson*, above cited. The *dicta* were *obiter*, because, as above shown, that case, like the case at bar, concerned only facts occurring prior to the act of 1864. These *dicta* must be regarded as overruled. In *United States* v. *Schlesinger* (14 Fed. Rep., 682) Judge Lowell said:

> This statute [the act of 1845] gave no new rights. It simply removed the obstruction of *Cary* v. *Curtis*, and left the importer to his remedy at common law. That remedy, of course, was to pay, if compelled by the retention of his goods, and then to sue. * * * Does the act of 1864, now R. S., section 2931, change all this? I think not. *That act is not an enabling, but a limiting and restricting act. It does not purport to tell us when an action may be maintained, but only that a decision of the Department shall be final unless certain things are done.*

In the same case on appeal (*United States* v. *Schlesinger*, 120 U. S., 109, 120) Mr. Justice Blatchford, referring to *Barney* v. *Watson*, said:

> That case, however, arose before the act of June 30, 1864, was passed, and not under it, though adjudged here after it was enacted. But the decision

in *Arnson* v. *Murphy* was based on the view that §§ 3011 and 2931 coexist and must be construed together.

The Schlesinger case arose under the Revised Statutes, but the case of *Arnson* v. *Murphy*, 109 U. S., 238, which is referred to by Mr. Justice Blatchford, related to importations made in 1871, prior to the revision of the statutes, and squarely overrules the repeal theory by stating that the act of 1845 "was in force when the present action was brought."

One striking change was made in the act of 1845 by the revisers of 1874. It came from their hands no longer in the form of a restorative act, but distinctly in the form of an enabling act. The action has thus become no longer a common-law action, preserved and restricted by statute, but a statutory action, the rules of which are to be strictly complied with. (*Arnson* v. *Murphy*, *supra*., at p. 243; *Porter* v. *Beard*, 124 U. S., 429, 433; *Schoenfeld* v. *Hendricks*, 152 U. S., 691, 693.)

Except by making the act an enabling one, there seems to have been no change made by the revision of the statutes. Whether a certain amendatory act of 1877 had the effect materially to change the long-established practise in any particular is a question now pending in the lower courts (*Birtwell* v. *Saltonstall*, *supra*), and we shall therefore not discuss it.

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Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 218.

HIRAM BARNEY, LATE COLLECTOR, ETC., PLAINTIFF IN ERROR,

vs.

ALEXANDER RICKARD AND NOAH LODER, EXECUTORS, ETC., OF ALEXANDER RICKARD, DECEASED.

BRIEF IN BEHALF OF DEFENDANTS IN ERROR. FILED BY LEAVE OF COURT.

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Attorneys for Defendants in Error in Case No. 248.

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STATEMENT.

In the year 1863 and prior to June 30, 1864, Alexander Rickard, plaintiffs' testator, made thirty-nine importations from France "into the port of New York of veil bareges, plain bareges, crepe maretz, grenadines, and merinos" (p. 9, bottom). All of these goods except the merinos, which were composed wholly of worsted, were composed of silk warp and worsted weft (p. 10, top).

These importations were classified by the collector for duty at the rate of thirty (30) per centum ad valorem under the provisions of the third (3d) subdivision of section thirteen (13) of the act of March 2, 1861, reading as follows:

"On bunting, and all stained, colored, or printed, and on "all other manufactures of *wool*, or of which *wool* shall be "the component material, not otherwise provided for, thirty "(30) per centum ad valorem." (12 Stats., pp. 178, 185.) as amended by the sixth (6th) subdivision of section six (6) of the act of August 5th, 1861, as follows:

"In the same section (13), article third, strike out 'wool,' "wherever it occurs, and insert in each place 'worsted.'" (12 Stats., pp. 292, 294.)

And for two (2) cents per square yard additional duty under the provisions of the act of July 14, 1862, as follows:

"*And be it further enacted*, That, in addition to the duties heretofore imposed by law on the articles hereinafter mentioned and included in this section, there shall be levied, collected, and paid on the goods, wares, and merchandise herein enumerated and provided for, imported from foreign countries, the following duties and rates of duties—that is to say:

"On all delaines, cashmere delaines, muslin delaines, barege delaines, composed wholly or in part of worsted, wool, mohair, or goat's hair, and on all goods of similar description, not exceeding in value 40 cents per square yard, 2 cents per square yard." (12 Stats., pp. 543, 553.)

Against this classification the importer protested, claiming that the goods were legally dutiable at the rate of thirty-five (35) per centum ad valorem as "manufactures of worsted not otherwise provided for" under the provisions of section thirteen (13) of the act of March 2, 1861, as amended by section six (6) of the act of August 5, 1861, *supra*, and the further provision of section 9 of the act of July 14, 1862, imposing additional duties as follows:

"On bunting, worsted yarns, and on all other manufact- "ures of worsted or of which worsted shall be the com- "ponent material, not otherwise provided for, 5 per centum "ad valorem." (12 Stats., pp. 543, 553.)

Amos A. Smith, a custom-house broker, testified that his firm had made the entries in question at the custom-house for Rickard; and, further, that "the practice at the custom-"house, where there is any uncertainty as to the correct "rate of duty on any class of goods, is to take from the "merchant what is known as the (a) deposit. This deposit "is intended to cover and more than cover the exact amount "of duty. The exact duty not being known or the collector "not being able to get at the exact duty at the time of pres-"entation of the entry, an amount is taken which is suf-"ficient to cover and more than cover the duty, which "amount is known as a deposit." Such deposit is subject to the final liquidation of the entry (p. 10). Before the entry was finally liquidated the importer had no way of knowing what rate of duty was to be exacted (p. 11).

It appeared that on the days when entries Nos. 7, 8, 9, 23, 24, 25, 27, 28, 31, 32, 33, and 36 were respectively made Rickard had "deposited with the defendant, as collector of "customs, an amount of money which was equal to an "amount of duties thereon at the rate of *about* 40 per "centum ad valorem, or, in other words, an amount in ex-"cess of the amount of duties subsequently ascertained (to "be due) on liquidation of the entry; that upon such ascer-"tainment or liquidation the defendant, as said collector, "*retained out of said deposit* a certain sum as duties and "thereafter returned the excess to" Rickard.

In entry number 38 Rickard deposited with the defendant, as collector, a sum of money equal to an amount of duties thereon "*above* 40 per centum ad valorem," which amount, as in the other cases, was in excess of the amount of duties found to be due upon liquidation, and out of the deposit the collector retained the sum due and returned the excess to Rickard. Such deposits were all made prior to obtaining possession of the goods.

In all but four (4) of the above-numbered entries, viz., 27,

32, 33, and 36, Rickard obtained possession of the goods prior to the *date* of protest, and in all except number 27 prior to liquidation.

In each entry the protest was filed *prior* to liquidation, and in no case was any portion of the deposit money refunded until subsequent to liquidation and protest.

As to each of said entries defendant's counsel moved the court to instruct the jury to find for the defendant because the payment of the duties sought to be recovered was made on or about the dates of the respective entries, and the protests against the exaction of such duties were not made until *after* such payments, "or, in other words, were not made at or "before such payment, as required by the act of February "25, 1845" (p. 19).

Defendant's counsel also moved the court to instruct the jury to find for the defendant on the ground that "if the "date of the payment of the duties exacted thereon was not "the date of the entry thereof and was the date of the liqui- "dation of such duties, * * * the plaintiffs' testator "obtained possession of the goods embraced within such im- "portations before such payment, or, in other words, did not "pay the duties thereon to obtain such possession, as re- "quired by said act of 1845" (p. 20).

Both of these motions the court denied and exceptions were noted.

Upon such denials and exceptions plaintiff in error bases his first assignment of error.

During the trial the plaintiff introduced as a witness on his behalf Gardiner S. Hawes, who testified that from 1852 until 1880 odd he was interested in and subsequent to 1863 was a partner in the firm of Marlot & Company, which firm was engaged in importing French goods; "that they im- ported principally * * * merinos, * * * veil bareges, plain bareges, crepe maretz, grenadines, and all sorts of fancy

dress goods and silks" (p. 12); that as a merchant he knew articles of merchandise like certain samples shown to him; that one of the samples (Exhibit No. 43) "was a *veil barege* "made of silk and worsted (and) differed in no respect from "*veil bareges* known in trade and commerce in this country "in 1861, '2, '3, and '4; that sample Exhibit 44 did not "differ at all from a *plain barege*, a silk and worsted barege, "as known in trade and commerce in 1861, '2, '3, and '4; "* * * that Exhibit 45, another sample, was a *grena-* "*dine*; * * * that it did not differ in any respect from "what was known to trade and commerce in this country "in 1862, '3, and '4 as *grenadine*" (p. 13).

These samples having been offered in evidence, their admission was objected to by defendant's counsel because—

(1.) Immaterial, and,

(2.) Not in any way connected with any goods in suit.

The objections were overruled, exceptions noted, and upon such ruling and exceptions plaintiff in error founds his second assignment of error (pp. 12 and 13).

This witness also testified that during the years 1862, '3, and '4 his firm dealt in an article known as *crepe maretz*, the character and appearance of which he proceeded (without objection on the part of defendant's counsel) to describe (pp. 14, 15).

Other witnesses in behalf of plaintiff were produced, but their testimony concerning the samples did not differ from that of Hawes. No samples other than the above were introduced in evidence (p. 15).

ARGUMENT.

The protests were made at or before the payment of the duties and in order to obtain possession of the goods. (Act of February 26, 1845, 5 Stats., 727.)

Immediately upon the entry of the goods in question a difference arose between the importer and the collector as to their proper classification for duty—the former claiming them to be dutiable at the rate of 35 per centum ad valorem, while the latter insisted that they were properly dutiable at 35 per centum ad valorem and 2 cents per square yard additional—and the duties were finally liquidated on the latter basis. Pending the final liquidation, however, and in view of the dispute and uncertainty as to the correct rate of duty to be charged, the importer made and the collector accepted a "deposit" of money which was equal to an amount of duties on the various importations at the rate of "about" or "above" 40 per centum ad valorem, which "deposit" was in each instance in excess of the amount of duties claimed by the collector and subsequently levied and collected on the various entries.

The practice of the custom-house during the years 1862, 1863, and 1864, to take a "deposit" of money in cases of doubt and uncertainty as to the correct rate of duties to be levied, thereby releasing the goods from further detention, is established by the record.

The "deposits" stood in lieu of the goods. The Government revenue was amply protected thereby, and the public convenience, which is only to be subordinated to the protection of the revenue, was furthered. No law prohibited the practice; policy and custom sanctioned it, and the Treasury Department by solemn declaration subsequently declared it to be proper. (Decisions Secretary of the Treasury, 1878, p. 578, No. 3633.)

Pending liquidation of the entries the "deposits" represented the "goods," and like the goods themselves guaranteed the payment of the duties upon liquidation. As between the collector and the importer and within the purview of the act of February 26, 1845, the "deposits" differed not at all from the "goods" themselves.

Where, pursuant to this practice, the goods have been received by the importer prior to the ascertainment and assessment of duties neither should be permitted to take advantage of the delivery of the goods as changing the rights of the other. The collector cannot say that the payment was voluntary, *because he had the power upon liquidation to appropriate the plaintiff's money* instead of his goods (Porter *vs.* Beard, 15 Fed. Rep., 381, reviewed and affirmed on one branch in 124 U. S., 429). When the entries were liquidated and the duties were deducted from the "deposits" can it be said that within the fair meaning of the statute that the money was not paid "as and for duties * * * in order to obtain the goods?"

The case of Barney *vs.* Watson (92 U. S., 449) is not at all upon all fours with the case at bar. There Watson on December 24, 1863, imported certain bales of woolen goods which he claimed were commercially known as flannels, and were therefore only subject to duty at the rate of 35 per centum ad valorem. The collector, on the other hand, contended that they were dutiable at the rate of 35 per centum ad valorem and 18 cents per pound additional as "manufactures of wool * * * not otherwise provided for, weighing less than twelve ounces per yard." Pending a decision of this dispute and prior to final liquidation the collector appears to have estimated the duties due on the importation *at the rate contended for by Watson* (see Transcript of Record, October term, 1875, case No. 207, pp. 14, 15, clerk's office Sup. Court U. S.), and the latter paid on December 26 the full

amount so calculated, viz., $8,840.93, without objection or protest. That calculation being in strict accord with Watson's contention, the result was not questioned by him, and the payment of the said sum was a voluntary payment. Subsequently the entry was finally liquidated, the original computation of the duties was *twice* revised and corrected, and as a conclusion the duties were "increased" $1,182.71. This additional amount was paid under protest and furnished the basis for the suit. In his suit Watson seems not to have limited his attempted recovery to the amount so paid under protest, but to have enlarged the same, and, by some calculation not easily to be ascertained from the record, the jury returned a verdict for $2,235.72, which was "the whole amount demanded, with interest." How much was principal and how much interest does not appear, but it was evidently the opinion of this Court that the amount was in excess of the amount paid under protest, and to that extent erroneous.

There is no foundation for the suggestion of the learned counsel for the Government that no protest was made at the time of the payment of the $8,840.93, "because the importer, relying on certain dicta in Marriott *vs.* Brune," probably "thought the transfer of money in December was a 'deposit' and not a true payment within the meaning of the act of 1845" (Brief, p. 11). On the contrary, a study of the transcript of the record will quickly convince one that the importer had no idea he was making a "deposit," but was satisfied to make a payment of duties calculated according to his own contention, leaving the matter of the additional specific duty open for future action.

There is no conflict whatever between the opinions of this court in Barney *vs.* Watson, *supra*, and Marriott *vs.* Brune (9 How., 619).

The former case involved an importation of woolen goods which were not subject to loss in bulk in transportation, and the question in dispute was not as to the *quantity* of goods

properly dutiable, but only as to the rate. The latter case involved importations of molasses and sugar, which, by reason of leakage and drainage, were peculiarly subject to loss of weight and bulk in transportation, and the difference between the importer and collector was not as to the *rate* of duty, but as to the amount of sugar or molasses upon which such rate should be calculated. The collector ruled that the duty should be assessed upon the *amount* as stated in the invoice. The importer contended that he should pay upon the amount "actually imported"—only. As the loss in weight and gauge could only be ascertained subsequent to landing, and as no landing permit could legally be issued until the estimated duties were first paid, the court rightly held that in *such cases* the law did not require a protest to be filed prior to paying the *estimated* duties, for at the time of such payment the importer could not know whether there had been any loss by leakage nor whether the collector would exact duty on more than the quantity actually imported.

It is difficult to perceive why the ruling of either the circuit court or of this Court upon this point should be denominated as *dicta*. The sufficiency of the protests made subsequent to the payment of the "estimated" duties and prior to the final adjustment was directly in issue.

In the circuit court Mr. Chief Justice Taney disposed of it in the following words:

"The remaining question is, what duties were paid, *under protest*, within the meaning of the act of 1845 (c. 22, 5 Stat., 727)? That act requires that the protest shall be in writing, signed by the claimant, at or before the payment of the duties, and set forth, distinctly and specifically, the ground of objection. The protest of 9 April, 1847, cannot apply to payments previously made and the plaintiff is not entitled to recover them, but it is sufficient to cover all subsequent payments, and a particular protest in each case is not required by law. The object of the protest is merely to give notice to the officer of the Government that the importer means to claim the reduction and to make known to the

collector the grounds upon which he makes the claim. In these respects this protest is sufficiently explicit and covers all the cargoes *upon which the duties had not been finally assessed and adjusted by the collector.* The protest is not required to be made on or before the payment of what are called the estimated duties, for this payment is necessarily regulated by the invoice quantity as well as the invoice price. The importer cannot, at that time, know whether there has been any loss by leakage, nor can he know, after it has been ascertained by the weigher and gauger, whether the collector will exact duties upon the amount stated in the invoice. The protest is legally made *when the duties are finally determined and the amount assessed by the collector*, and a protest before or at the time is sufficient notice, as it warns the collector, before he renders his account to the Treasury Department, that he will be held personally responsible if the portion disputed is not legally due, and that the claimant means to assert his rights in a court of justice. The payment of the money upon the estimated duties is rather in the nature of a pledge or deposit than a payment, for it remains in the hands of the proper officer subject to the final assessment of the duties, and if more has been paid than is due (which is most commonly the case) the surplus belongs to the importer and is returned to him.

"Upon the whole, the court is of opinion that the plaintiff is entitled to recover for the amount of the deficiency in the sugar and molasses by leakage, as mentioned in the case stated; that the reduction ought to be made according to the dutiable value of the portion lost, and that the protest of April 9, 1847, covers all the cargoes *where duties had not before been finally assessed and adjusted by the collector.*"

Brune *vs.* Marriott, Taney, 132, 4 Fed. Cases., p. 475, case No. 2052.

In affirming the judgment this Court, through Mr. Justice Woodbury (9 How., 636), said:

"Where the duties had not been closed up in any cases when the written protest in April was filed, though the preliminary payment of the estimated duties had taken place, the court justly considered the protest valid, because, till the final adjustment, the money remained in the hands

of the collector, and is not accounted for with the Government, and more may be necessary to be paid by the importer."

In Robertson *vs.* Downing, 127 U. S., 607–614, it was held that the time within which a protest could be filed did not begin to run until the date of final liquidation, and in the case of Davies *vs.* Miller (130 U. S., 284), where the point in dispute was whether a protest filed after the collector's decision as to rate and amount, but prior to final liquidation, sufficiently complied with the act of June 30, 1864 (not involved in the case at bar), the Court, through Mr. Justice Gray, cited, with approval, the case of Marriott *vs.* Brune (*supra*) and declared that—

"That judgment * * * was generally regarded and acted upon as laying down a general rule establishing the validity of prospective protests;" and, further, that "the matter to which the notice of dissatisfaction applies is the decision of the collector on the rate and amount of the duties. The whole purpose of the notice is to give the collector opportunity to revise that decision, and that purpose is as well accomplished by giving the notice as soon as the goods have been entered and the duties estimated by the collector as by postponing the giving of the notice until after final ascertainment and liquidation."

Tremlett *vs.* Adams (13 Howard, 295) (p. 28 of Brief for the Collector) is not in point. There the amount paid by the importer was paid, not as a deposit, *but as and for duties*, and this is admitted by his third prayer for instructions (pp. 298 and 299), as follows: "That the plaintiff, being unlawfully prevented from warehousing his goods as aforesaid and required *to pay duties* upon them according to the rates established," etc.

In Crocker *vs.* Redfield, 4 Blatch., 378 (6 Fed. Cases, No. 3400), the protest was held to be defective because made "after the duties were ascertained," and therefore too late.

The ruling was undoubtedly correct and does not militate against our contention, for here protests were filed prior to the ascertainment and liquidation of the duties.

It is submitted that the principles enunciated in Marriott *vs.* Brune (*supra*), as supported by the later cases cited, afford ample authority upon which to base an affirmance of the judgment of the circuit court in this case.

The "deposit" considerably in excess of the estimated duties, according to the collector's own notion of the rate of duties, was in lieu of the goods, and its retention afforded ample opportunity for *duress*. Prior to the liquidation, and consequently prior to the application of any portion of the deposit to the settlement of duties, the importer protested against the application of more thereof than was necessary to satisfy duties at the rate of 35 per centum ad valorem. Despite this protest and *in invitum* the collector deducted the higher rate. Can it reasonably be said that the duties were not paid under protest and in order to obtain the goods?

The Samples Were Properly Admitted in Evidence.

Having established the fact of the importation of veil bareges, plain bareges, grenadines, etc., and the dispute being as to the correct classification of the goods, it was clearly competent to introduce testimony to prove the character of the goods which were known by such names. That such knowledge was peculiarly within the possession of those interested in dealing in such manufactures cannot be doubted. As such it was properly the subject of expert testimony.

In this connection plaintiffs' testator introduced one Hawes, who had for many years prior to 1863 and 1864

and subsequent thereto been engaged in importing "merinos, * * * veil bareges, plain bareges, crepe maretz, grenadines, and all sorts of fancy dress goods and silks."

He described the component elements and the appearance and character of goods known to the trade in 1862, 1863, and 1864 by such names and identified certain samples which he said differed not at all from such goods.

The samples were not submitted as tending to prove that Rickard had imported similar goods, but merely for the purpose of informing the jury as to the character and component elements of goods which in the years mentioned were known among importers and merchants by the above names. It is submitted that their introduction for such purpose was not error.

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March, 1895.